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# ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2017-2018

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CR-05-1805

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ToForest Onesha Johnson

v.

State of Alabama

Appeal from Jefferson Circuit Court  
(CC-96-386.60)

On Remand from the United States Supreme Court

JOINER, Judge.

ToForest Onesha Johnson was convicted of capital murder for killing Jefferson County Deputy Sheriff William G. Hardy. Following the jury's 10-2 recommendation, the circuit court

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sentenced Johnson to death. On direct appeal, this Court affirmed Johnson's capital-murder conviction and sentence of death. See Johnson v. State, 823 So. 2d 1 (Ala. Crim. App. 2001). The Alabama Supreme Court and the United States Supreme Court denied certiorari review. See Ex parte Johnson, 823 So. 2d 57 (Ala. 2001), and Johnson v. Alabama, 535 U.S. 1085 (2002).

In 2003, Johnson filed a Rule 32, Ala. R. Crim. P., petition attacking his conviction and death sentence. The circuit court denied the petition, and Johnson appealed. This Court remanded the matter twice for additional proceedings--once in 2007 and again in 2013. In 2015, we affirmed the circuit court's denial of the Rule 32 petition. See Johnson v. State, [Ms. CR-05-1805, Sept. 28, 2007] \_\_\_ So. 3d \_\_\_ (Ala. Crim. App. 2007). The Alabama Supreme Court denied certiorari review on November 18, 2016.

Johnson filed a petition for a writ of certiorari with the United States Supreme Court. In that petition, Johnson raised one issue: whether his claim that the State suppressed information that Victoria Ellison testified against Johnson out of hope for a reward warranted a remand to this Court for

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further consideration in light of Ex parte Beckworth, 190 So. 3d 571 (Ala. 2013). In its response to Johnson's petition, the State conceded that the case should be remanded.

On July 28, 2017, the United States Supreme Court granted Johnson's petition for a writ of certiorari. The Court's mandate stated:

"On petition for writ of certiorari to the Court of Criminal Appeals of Alabama. Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari granted. Judgment vacated, and case remanded to the Court of Criminal Appeals of Alabama for further consideration in light of the position asserted by the [State of Alabama] in its brief filed on May 10, 2017."<sup>1</sup>

Johnson v. Alabama, 137 S. Ct. 2292, 2292 (2017).

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<sup>1</sup>Chief Justice Roberts, joined by Justices Thomas, Alito, and Gorsuch, dissented. Chief Justice Roberts wrote:

"Beckworth is a state court decision that turns entirely on state procedural law. It was expressly called to the attention of the state courts, which declined to upset the decision below in light of it. ... The question presented concerns state collateral review--purely a creature of state law that need not be provided at all. Whatever one's view on the propriety of our practice of vacating judgments based on positions of the parties, see Hicks v. United States, 582 U.S. \_\_\_, 137 S. Ct. 2000, \_\_\_ L. Ed. 2d \_\_\_ (2017), the Court's decision to vacate this state court judgment is truly extraordinary."

Johnson v. Alabama, 137 S. Ct. 2292, 2292-93 (2017) (Roberts, C.J., dissenting).

The evidence against Johnson is set forth in multiple opinions and will not be recounted in detail here other than to note that Victoria Ellison was a key witness for the State. Ellison testified at Johnson's trial and stated that she had listened in on a three-way telephone call her daughter had made for Johnson while he was in jail awaiting trial. Ellison testified that during the call Johnson said, "I shot the fucker in the head and I saw his head go back and he fell. ... He shouldn't have got in my business, messin' up my shit." (Direct Appeal R. 683-84.)

In his third amended Rule 32 petition, Johnson alleged:

"The State also withheld crucial evidence regarding Violet Ellison's motivation for coming forward with her story. Although news of the large cash reward offered in the case was widespread, the State never disclosed to Mr. Johnson's lawyers that Ms. Ellison had specifically come forward with her story pursuant to the reward offer, although it knew this to be the case. Had Mr. Johnson's lawyers known that Ms. Ellison was specifically motivated by the reward money, they would have had in their possession powerful impeachment evidence with which to challenge her credibility on cross-examination."

The circuit court denied the claim on the basis that the information regarding Violet Ellison's motivation to testify amounted to impeachment evidence. This Court's opinion of September 28, 2007, upheld the denial of that claim, citing

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authority that the claim was "procedurally barred because [Johnson] failed to satisfy the requirements of Rule 32.1(e) [, Ala. R. Crim. P.,] and because of the preclusionary grounds of Rule 32.2(a)(3) and (5), Ala. R. Crim. P." Johnson, \_\_\_ So. 3d at \_\_\_\_.

In 2013, the Alabama Supreme Court in Ex parte Beckworth, supra, recognized that a petitioner may allege a claim for relief under Rule 32.1(a) based on an alleged violation of Brady. In such a case, the Court held, the petitioner does not have to plead facts in the initial petition to negate the preclusive bars of Rule 32.2(a)(3) and (5), Ala. R. Crim. P. Ex parte Beckworth, 190 So. 3d at 575.

Johnson's claim that the State knew Ellison was motivated by hope of a reward and did not disclose that fact to Johnson is a claim for relief under Rule 32.1(a), Ala. R. Crim. P. Johnson thus far has not had the opportunity to establish that the preclusionary grounds do not apply or to prove his claim. In light of Ex parte Beckworth, Johnson is entitled to that opportunity.

Accordingly, this matter is remanded for additional proceedings. On remand, the circuit court shall conduct an

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evidentiary hearing on Johnson's Brady claim related to the State's alleged knowledge of and alleged failure to disclose to Johnson that Violet Ellison testified against Johnson in the specific hope of obtaining the reward offered in the case. The circuit court shall enter specific written findings, including any ground of preclusion, as to that claim. Return to remand should be made to this Court within 56 days of the release of this opinion.

REMANDED WITH INSTRUCTIONS.

Windom, P.J., and Welch, Kellum, and Burke, JJ., concur.